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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 86

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, ET AL.,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

MOTION OF APPELLEE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA FOR LEAVE TO FILE MOTION TO DISMISS OUT OF TIME AND MOTION TO DISMISS

FERRILL H. ROGERS,
Oklahoma Corporation Commission,
State Capitol Office Building,
Oklahoma City, Oklahoma,
Attorney for Appellee, the Corporation Commission of the State of Oklahoma.

April, 1957.

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In the
Supreme Court of the United States
OCTOBER TERM, 1956

No. 809

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,

VERSUS

THE CORPORATION COMMISSION OF THE
STATE OF OKLAHOMA, ET AL.,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE
STATE OF OKLAHOMA.

MOTION OF APPELLEE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA FOR LEAVE TO FILE MOTION TO DISMISS OUT OF TIME

Appeliee the Corporation Commission of the State of Oklahoma respectfully moves the Court for leave to file simultaneously herewith its Motion to Dismiss in the above-entitled cause.

In support of this motion, appellee respectfully shows that Phillips Petroleum Company has filed its Notices of Appeal in this case and in its companion cases entitled Panhandle Eastern Pipe Line Company v. The Corporation

Commission of Oklahoma, *et al.*, and Natural Gas Pipeline Company of America v. The Corporation Commission of Oklahoma, *et al.*; however, appellee has not yet been served with Phillips' Jurisdictional Statements. These cases all involve one administrative order issued by the Corporation Commission of Oklahoma. This appellee received the Jurisdictional Statement of appellant Michigan-Wisconsin Pipe Line Company in the above-entitled cause on March 1, 1957, and received the Notices of Appeal of appellant Phillips Petroleum Company in all three of the above cases on March 3, 1957. Due to press of work, consultation with many attorneys and illness of the Conservation Attorney, appellee has been unable to prepare and file this statement within 30 days after receipt of the Jurisdictional Statement in Case No. 809.

Appellee, The Corporation Commission of Oklahoma believes that its Motion to Dismiss is meritorious for the reasons fully set forth in said motion and therefore it is believed desirable for the Court to have this appellee's Motion to Dismiss before it in Case No. 809.

FERRILL H. ROGERS,

Attorney for Appellee, the Corporation Commission of the State of Oklahoma.

MOTION OF APPELLEE, THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA TO DISMISS

Appellee, the Corporation Commission of the State of Oklahoma, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal in the above-entitled case on the grounds (a) that appellant, Michigan-Wisconsin Pipe Line Company, is not aggrieved by the order of the Oklahoma Supreme Court from which it here seeks to appeal and that accordingly there is no case or controversy in which appellant has a justiciable interest and no substantial federal question; (b) that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; and (c) that the order of the Oklahoma Supreme Court from which appellant here seeks to appeal rests on an adequate non-federal basis.

STATEMENT OF CASE

The appellant is a natural gas pipeline company. It does not purchase natural gas at the wellhead but confines its purchases to residue gas at the outlets of gasoline plants.

Order No. 26096 of the Corporation Commission of the State of Oklahoma entered on July 29, 1952, and fixing a minimum price for sale of natural gas produced from the Guymon-Hugoton Field in Oklahoma (this order is set out in full as Appendix "B" to appellant's Jurisdictional Statement filed on this appeal) was divided into several parts. One portion of the order prohibited the sale of gas at the wellhead at less than 9.8262 cents per m.c.f. Another portion of the order prohibited the sale of residue gas at less than

9.8262 cents per m.c.f. This provision fixing a minimum price for the sale of residue gas was the only portion of the order which affected the appellant.

In its appeal to the Supreme Court of Oklahoma (Cause No. 35732, opinion reported in 272 P.2d 425), and then to this Court (Cause No. 320, October Term 1954, opinion reported 349 U.S. 908, 75 Sup. Ct. 598), appellant raised only the question of the validity of the Corporation Commission's order insofar as it applied to appellant's purchases of residue gas, which purchases are made after the completion of production, gathering and processing of the natural gas (Page 4 of appellant's Statement as to Jurisdiction in Cause No. 320, October Term 1954).

This Court ruled (349 U.S. 908) that the attempt by the Oklahoma Corporation Commission to fix a minimum price for appellant's purchases of residue gas was invalid. It based its decision upon the authority of the case of *Natural Gas Pipeline Company* v. *Panoma Corporation*, 75 Sup. Ct. 576, 349 U.S. 44 (1955), a case which also dealt with the sale of residue gas to an interstate pipeline company at the outlet of a gasoline plant after the completion of production, gathering and processing. In the *Panoma* case this Court stated (349 U.S. 44) that it was dealing with a situation where Oklahoma had attempted "to fix a minimum price to be paid for natural gas, after its production and gathering has ended, by a company which transports the gas for resale in interstate commerce." This Court then stated that "such a sale and transportation cannot be regulated by a State but are subject to the exclusive regulation of the Federal Power Commission" (349 U.S. 44, 45); citing

Phillips Petroleum Co. v. *Wisconsin*, 347 U.S 672, 74 Sup. Ct. 794, a case which also involved sales of residue gas to an interstate pipeline company which sales occurred at the outlet side of a gasoline plant after processing had been completed.

By its Order on Mandate on October 8, 1956 (this order is set out in full as Appendix "A" of appellant's Jurisdictional Statement filed on this appeal), the Oklahoma Supreme Court complied fully with this Court's order of reversal and set aside Order No. 26096 insofar as it pertained to appellant's purchases of residue gas. The Oklahoma Supreme Court refused, however, to go beyond this Court's order by invalidating that portion of Order No. 26096 fixing a minimum price for natural gas sold at the wellhead in the Guymon-Hugoton Field of Oklahoma. Appellant now urges that this Court's order requires that the wellhead portion of Order No. 26096 be invalidated despite the fact that the validity of the wellhead portion of the order was never placed in issue before this Court or before the Oklahoma Supreme Court in appellant's initial appeal to that court and despite the fact that appellant has no interest in the wellhead portion of Order No. 26096 since it makes no purchases of natural gas at the wellhead.

Proposition I.

Appellant is not aggrieved by the Order of the Oklahoma Supreme Court and accordingly there is no case or controversy in which appellant has a justiciable interest and no substantial Federal question.

Throughout the course of this litigation appellant has repeatedly stated that it is a purchaser of residue gas at the outlets of gasoline plants rather than at the wellhead. Its most recent statement to that effect appears on pages 4 and 5 of its Jurisdictional Statement filed on this appeal. That portion of Order No. 26096 fixing a minimum price for gas sold at the wellhead does not affect appellant. The Oklahoma Supreme Court's Order on Mandate of October 8, 1956, invalidated Order No. 26096 insofar as it applied to appellant's purchases of residue gas. Appellant had no further interest in Order No. 26096. It is therefore not for appellant to raise the question of the validity of the wellhead portion of Order No. 26096 for it is not aggrieved thereby. In the case of *Louisville R. Co. v. Finn*, 235 U.S. 601, 35 Sup. Ct. 146 (1915), this Court stated:

> "This Court does not sit to pass upon moot questions; and, as has been often pointed out, it is incumbent upon one who seeks an adjudication that a state statute is repugnant to the Federal Constitution to show that he is within the class with respect to whom it is unconstitutional, and that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Constitution."

Appellant would attempt to establish that it has an interest in the wellhead portion of Order No. 26096 by asserting that if the wellhead price is sustained Phillips

Petroleum Company, which sells residue gas to appellant, might discontinue some of its wellhead purchases and thereby reduce appellant's supply of gas or that if the wellhead price is sustained, it may result in increased rates for gas purchased by appellant. This asserted interest of appellant is at most indirect and speculative and we submit that it is not sufficient to give appellant a direct interest in the wellhead portion of the order on which to base this appeal. Section 7(b) of the Natural Gas Act, 15 U.S.C.A. 717f(b), prevents Phillips from abandoning all or any portion of the gas service rendered by it to appellant from the gasoline plant to which appellant's transmission line is connected without first obtaining permission or approval from the Federal Power Commission. Such permission can be given only if, after a hearing, the Commission finds that the available supply of natural gas is depleted or that present or future convenience or necessity permits such abandonment. Obviously the gas reserves involved are not depleted and it is equally obvious that public convenience or necessity would not permit Phillips to deprive appellant of all or a substantial portion of its gas supply. Also the case of *United Gas Pipeline Company* v. *Mobile Gas Service Corp.*, 76 Sup. Ct. 373, 350 U.S. 332 (1956), demonstrates that regardless of what Phillips may pay independent producers for gas it purchases at the wellhead, Phillips cannot unilaterally change its contract price to appellant nor will a change in price of the gas Phillips purchases at the wellhead authorize Phillips to file for a higher rate with the Federal Power Commission.

Proposition II.

The Federal question sought to be reviewed was not timely or properly raised, or expressly passed on.

In its original appeal to the Oklahoma Supreme Court and in its original appeal to this Court, appellant raised only the issue of the validity of that portion of Order No. 26096 which fixed a minimum price for appellant's purchases of residue gas. That the wellhead portion of the Order was not in issue before the Oklahoma Supreme Court is clearly shown by the statement made in that Court's Opinion, *Natural Gas Pipeline Co. v. Corporation Commission*, 272 P.2d 425 (1954), at page 432, where it states:

> "All parties concede that under the cases cited above the Commission can fix the price of gas as taken from the structure."

That appellant did not raise the issue of the wellhead portion of the Order in its initial appeal to this Court (No. 320, October Term, 1954) is shown by its Statement of the Questions Presented made in its Statement as to Jurisdiction filed therein, which Statement was as follows:

> "1. Whether the Corporation Commission of Oklahoma has the power, consistently with the Commerce Clause of the Constitution of the United States (Art. I, Sec. 8, Cl. 3) and the Natural Gas Act (15 U.S.C. 717, *et seq.)*, to fix the price of residue gas sold at the outlet of a gasoline plant to an interstate pipeline company for immediate transportation to markets in other states, or to prohibit the production of natural gas if the price fixed for residue gas obtained therefrom is not obtained

"2. Whether, as applied to Michigan-Wisconsin, the Commission's order fixing the price of residue gas sold in Texas is an attempt to exercise extraterritorial jurisdiction and violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

"3. Whether, as applied to appellants, the Commission's order is arbitrary and unreasonable and abrogates private contracts for no public purpose, contrary to the Due Process Clause of the Fourteenth Amendment and the Contract Clause (Art. I, Sec. 10) of the Constitution of the United States."

Only at this late date has appellant sought to raise the validity of the wellhead portion of Order No. 26096. Natural Gas Pipeline Company of America and Panhandle Eastern Pipe Line Company, purchasers of residue gas situated similarly to appellant, took appeals to the Oklahoma Supreme Court (No. 35731 and No. 35734) and to this Court (No. 321 and No. 322) from that portion of Order No. 26096 fixing a minimum price for residue gas in companion cases to this case, but neither ever raised the question of the validity of the wellhead portion of the Order, nor have either of them attempted to perfect appeals to this Court from the October 8, 1956 Order on Mandate of the Oklahoma Supreme Court.

We respectfully submit therefore that the question which appellant now seeks to have reviewed was not timely or properly raised or expressly passed on and that this appeal should be dismissed. *McCullough* v. *Kammerer*, 323 U.S. 327, 65 Sup. Ct. 297 (1945); *Duignan* v. *United States*, 274 U.S. 195, 47 Sup. Ct. 566 (1927).

Appellant seeks to have this Court now decide, as a by-product of this case and after this case has been litigated through both the Supreme Court of the State of Oklahoma and this Court, a question which it did not raise in its original appeals and yet a question which involves matters of tremendously vital consequence to the entire natural gas industry. Appellant asks this Court to decide at this time, in this casual manner and in a case where the question has not been properly raised nor the necessary facts for a decision included in the record, the questions (1) of whether sales of natural gas by independent producers at the wellhead are sales in interstate commerce for resale for ultimate public consumption, if the gas ultimately crosses a state line, and (2) of whether, if such sales are in interstate commerce for resale for ultimate public consumption they are within the production and gathering exemption of Section 1(b) of the Natural Gas Act, 15 U.S.C.A. 717(b). Indeed appellant in its Jurisdictional Statement filed on this appeal appears to assume that it is settled that such sales are sales in interstate commerce and are not within the production and gathering exemption; yet we have been unable to find any case, and we submit that there is none, so holding with respect to such sales. Appellee does not admit that sales of gas at or near the wellhead are sales in interstate commerce. If such sales are sales in interstate commerce, then appellee does not admit that they are not covered by the production and gathering exemption contained in Section 1(b) of the Natural Gas Act. Being confined [illegible] to factual situations involving exclusively sales of residue gas from gasoline plants, that is, sales made after production, gathering and processing have been completed, the record presented to this Court

in the prior appeal (No. 320, October Term, 1954) can hardly be said to afford an adequate basis for passing on whether wellhead sales are interstate sales or whether sales are covered by the production and gathering exemption.

Cases presenting these points on adequate factual records are pending in the United States Court of Appeals for the Fifth Circuit on appeal from the Federal Power Commission. For example, *Deep South Oil Co.* v. *F. P. C.*, Case No. 15849; *Shell Oil Company* v. *F. P. C.*, Case No. 15900; and *Humble Oil and Refining Company* v. *F. P. C.*, Case No. 15884, all involve the question of whether wellhead sales constitute interstate commerce and, if so, whether such sales are exempt under the production and gathering exemption. These cases are awaiting disposition, having been argued on April 8, 1957. The Federal Power Commission is a party to those cases. So are independent producers whose rights would be radically affected if appellant's unwarranted assumptions were to be indulged in here. A pipeline company and a state agency are not, under the circumstances, appropriate parties to litigate those issues. Whatever law may be applicable to those issues, it ought to be established in cases dealing directly with those issues rather than with them incidentally. The record in this case deals only with residue sales made after production, gathering and processing have ceased. How can it be argued that this record provides an adequate basis for a decision on issues relating to wellhead sales?

The wellhead portion of Order No. 26096 is, except for the amount of the minimum price, identical to that order fixing a minimum price for sales of gas at the wellhead in

the Guymon-Hugoton Field of Oklahoma which was upheld by this Court in the case of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 71 Sup. Ct. 215, 340 U.S. 179 (1950). This Court held in that case that it is undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas and that the minimum wellhead price order of the Oklahoma Corporation Commission there under consideration was lawful since it was substantially related to a legitimate end sought to be attained. This Court then held the minimum wellhead price valid stating:

> "Insofar as conservation is concerned, the national interest and the interest of producing states may well tend to coincide. In any event, in a field of this complexity with such diverse interests involved, we cannot say that there is a clear national interest so harmed that the state price-fixing orders here employed fall within the ban of the Commerce Clause."

The action which appellant now asks this Court to take would require that the *Cities Service* case be overruled, a step which this Court did not take in its original decisions in this case and its companion cases. This Court found merely that the *Cities Service* case was not applicable to this case. The *Cities Service* case did not apply here because sales of residue gas at the outlets of gasoline plants after production, gathering and processing had ceased were all that were here involved. Now when appellant is attempting to enlarge the issues and to strike down that portion of Order No. 26096 dealing with a minimum price for natural gas sold at the wellhead, the *Cities Service* case stands squarely in appellant's path proclaiming that the wellhead portion of Order No. 26096 is a proper exercise

of the State of Oklahoma's police power legitimately directed toward the conservation of one of its precious natural resources. If this Court should overrule the *Cities Service* case such action would seriously jeopardize the power of the State of Oklahoma to take reasonable measures for the conservation of its valuable resource, natural gas. The position which appellant now takes, if upheld by this Court, might also, through an extension of the rule stated in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954), place in jeopardy the gross production tax which the State of Oklahoma levies upon the production of natural gas within the State of Oklahoma.

Proposition III.

The Order of the Oklahoma Supreme Court from which appellant here seeks to appeal rests on an adequate non-Federal basis.

This Court by its Order of April 18, 1955, invalidated that portion of Order No. 26096 which fixed a minimum price for appellant's purchases of residue gas. It is submitted that this must necessarily be the effect of the Order of April 18, since this Court had no other issues before it. After this Court's order, it remained for the Supreme Court of the State of Oklahoma to determine the purely state question of whether the invalidation of Order No. 26096 as to sales of residue gas required that the wellhead portion of Order No. 26096 also be declared to be invalid. The Oklahoma Supreme Court by its order in effect determined that the various portions of Order No. 26096 were separable and that the decision invalidating the residue portion of Order No. 26096 did not invalidate the wellhead portion of the order. Such order gave full effect to the de-

cision of this Court while at the same time effectuating the determination of the Oklahoma Supreme Court with respect to the purely state question of the separability of Order No. 26096. This Court held that the question of the separability of a state statute is one for the state court in the case of *Dorchy* v. *State of Kansas*, 264 U.S. 286, 44 Sup. Ct. 323 (1924), where it stated:

> "The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court."

Thus we submit that the determination of the Oklahoma Supreme Court that this Court's order invalidating the residue portion of Order No. 26096 did not require the invalidation of the entire order is not subject to review by this Court, since such determination rests on an adequate non-federal basis.

CONCLUSION

We respectfully submit, therefore, that for the reasons above set forth, this appeal of Michigan-Wisconsin Pipe Line Company should be dismissed.

FERRILL H. ROGERS,

Oklahoma Corporation Commission,
State Capitol Office Building,
Oklahoma City, Oklahoma,

Attorney for Appellee, the Corporation Commission of the State of Oklahoma.

April, 1957.